

**NICHOLAS & TOMASEVIC, LLP**

Craig M. Nicholas (SBN 178444)  
Jake W. Schulte (SBN 293777)  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, California 92101  
Tel: (619) 325-0492  
Fax: (619) 325-0496  
Email: [cnicholas@nicholaslaw.org](mailto:cnicholas@nicholaslaw.org)  
Email: [jschulte@nicholaslaw.org](mailto:jschulte@nicholaslaw.org)

**GLICK LAW GROUP, P.C**

Noam Glick (SBN 251582)  
225 Broadway, 19<sup>th</sup> Floor  
San Diego, CA 92101  
Tel: (619) 382-3400  
Fax: (619) 615-2193  
Email: [noam@glicklawgroup.com](mailto:noam@glicklawgroup.com)

**FORUM LAW PARTNERS, LLP**

R. Jeffrey Neer (SBN 190417)  
803 Deep Valley Dr.  
Rolling Hills Estates, CA 90274  
Tel: (310) 974-8800  
Fax: (310) 974-8801  
Email: [jeff@forumllp.com](mailto:jeff@forumllp.com)

Attorneys for Defendants

KIM EMBRY & ENVIRONMENTAL HEALTH ADVOCATES, INC.

**UNITED STATES DISTRICT COURT**

**EASTERN DISTRICT OF CALIFORNIA**

B&G FOODS NORTH AMERICA, INC.,

Plaintiff,

vs.

KIM EMBRY and ENVIRONMENTAL  
HEALTH ADVOCATES, INC., acting as  
enforcement representatives under California  
Proposition 65 on behalf of the State of  
California,

Defendant.

Case No.: 2:20-cv-00526-KJM-DB

**DEFENDANTS' NOTICE OF HEARING RE:  
MOTION TO STRIKE PLAINTIFF'S  
ERRATA / SHAM AFFIDAVIT**

**Hearing Date:** July 12, 2024

**Hearing Time:** 10:00 a.m.

**Location:** Courtroom 27

**Judge:** Hon. Kimberly J. Mueller

**Magistrate:** Hon. Deborah Barnes

1 **TO THE COURT AND ALL PARTIES AND THEIR ATTORNEYS OF RECORD:**

2 **PLEASE TAKE NOTICE** that on July 12, 2024, at 10:00 a.m. through submission to the  
3 Honorable Magistrate Deborah Barnes, in Courtroom 27 of this Court, located at the Robert T.  
4 Matsui United States Courthouse, 501 I Street, Sacramento, CA 95814, Defendants Kim Embry and  
5 Environmental Health Advocates, Inc. (“Defendants”), through counsel, shall and hereby do move,  
6 pursuant to Federal Rule of Civil Procedure 30(e), for an order striking the purported “errata” served  
7 by Plaintiff B&G Foods North America, Inc. (“B&G”).

8 Plaintiff B&G served an errata sheet for its own 30(b)(6) deponent that is 34-pages long.  
9 B&G’s lengthy errata improperly contradicts its corporate representative’s sworn testimony in an  
10 attempt to materially change the testimony Juvenal Marchisio [the 30(b)(6) witness] provided under  
11 oath on behalf the company. In total, B&G offers 69 instances of rewriting affirmative “Yes”  
12 responses to “No” responses and vice versa. This is not a permissible use of Federal Rule of Civil  
13 Procedure 30(e) in the Ninth Circuit:

14 Rule [30(e)] cannot be interpreted to allow one to alter what was said under oath.  
15 If that were the case, one could merely answer the questions with no thought at all  
16 then return home and plan artful responses. Depositions differ from interrogatories  
in that regard. **A deposition is not a take home examination.**

17 *Hambleton Bros. Lumber Co. v. Balkin Enters., Inc.*, 397 F.3d 1217, 1225 (9th Cir. 2005).

18 This Circuit permits errata only to correct mistakes in the transcript, not to alter testimony:  
19 “Rule 30(e) is to be used for corrective, and not contradictory, changes.” *Hambleton Bros.*, 397 F.3d  
20 at 1225-26. Yet, the changes that B&G has proposed to Mr. Marchisio’s testimony through  
21 purported errata are not “corrective” changes to clarify the record or to correct transcription errors.  
22 Rather, the proposed changes attempt to do what is expressly prohibited – i.e., alter what was said  
23 under oath to undo admissions that are fatal to B&G’s claims. Rule 30(e) does not permit a witness  
24 to use errata to withdraw or rewrite testimony after the fact in the hopes of manufacturing a triable  
25 issue of material fact where none exists. Under Rule 30(e) and black-letter Ninth Circuit law, B&G’s  
26 purported “errata” should be stricken.

27 The errata sheet is also procedurally defective for at least two reasons. First, Rule 30(e)  
28 requires the deponent or a party to request review of the deposition transcript *before the deposition*

1 *is completed*. Fed. R. Civ. P. 30(e)(1). Here, no such request was recorded in the transcript.<sup>1</sup> Neither  
2 Mr. Marchisio nor counsel requested the opportunity to make changes. Requesting review is an  
3 “absolute prerequisite” for correcting a deposition transcript under Rule 30(e). *Hambleton Bros.*,  
4 397 F.3d at 1226. Second, even assuming such a request was made (it was not) or the lack of a  
5 request is not fatal (it is), the errata was not timely executed or served. A deponent has 30-days to  
6 make corrective changes after notification from the court reporter that the transcript was available.  
7 Fed. R. Civ. P. 30(e)(1). Here, the errata sheet was submitted more than 30-days after B&G’s  
8 counsel received notification from the court reporter.

9 In short, Defendants respectfully move the Court strike B&G’s errata sheet / sham affidavit  
10 on procedural and/or substantive grounds. The specifics of the parties’ dispute and the parties’  
11 respective contentions are detailed in the forthcoming Joint Statement.

12 Respectfully Submitted,  
13 Dated: June 10, 2024

**NICHOLAS & TOMASEVIC, LLP**

14 By: /s/ Jake W. Schulte  
15 CRAIG M. NICHOLAS (Bar No. 178444)  
16 [cnicholas@nicholaslaw.org](mailto:cnicholas@nicholaslaw.org)  
17 JAKE W. SCHULTE (Bar. No. 293777)  
18 [jschulte@nicholaslaw.org](mailto:jschulte@nicholaslaw.org)  
19 225 Broadway, 19th Floor  
20 San Diego, California 92101  
21 Tel: (619) 325-0492 | Fax: (619) 325-0496

22 NOAM GLICK (Bar No. 251582)  
23 [noam@glicklawgroup.com](mailto:noam@glicklawgroup.com)  
24 **GLICK LAW GROUP, P.C.**  
25 225 Broadway, 19<sup>th</sup> Floor  
26 San Diego, CA 92101  
27 Tel: (619) 382-3400 | Fax: (619) 615-2193

28 R. JEFFREY NEER (Bar No. 190417)  
[jeff@forumllp.com](mailto:jeff@forumllp.com)  
**FORUM LAW PARTNERS, LLP**  
803 Deep Valley Dr.  
Rolling Hills Estates, CA 90274  
Tel: (310) 974-8800 | Fax: (310) 974-8801

1 In accordance with Local Rule 133(j), contemporaneous with the filing of the Joint Statement, Defendants will provide “an electronic copy of the [entire] deposition [transcript] in lieu of the courtesy paper copy to the email box of the ... Magistrate Judge and concurrently email or otherwise transmit the deposition [transcript] to all other parties.”

Attorneys for Defendants KIM EMBRY &  
ENVIRONMENTAL HEALTH ADVOCATES,  
INC.

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